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In the

Supreme Court of the United States

October Term, 1946

No. 497

149 Madison Avenue Corp. and Williams & Co. Inc.,
Petitioners,

against

Frank Asselta, Camilo Del Rio, Joseph McArdle, Samuel Manne, Cornelius McCole, Burton Peterson, Frank Rodriguez, James Torra, John H. Berger and George Berger,
Respondents.

PETITION FOR REHEARING

Walter Gordon Merritt,
Robert R. Bruce,
Counsel for Petitioners.

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PETITION FOR REHEARING

Your petitioners, 149 Madison Ave. Corp. and Williams & Co., Inc. respectfully pray for a rehearing of the order of this Court dated October 28, 1946, denying their petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Basic Facts

This is an action under the Fair Labor Standards Act for time and a half overtime and liquidated damages. All facts in the case were stipulated.

The collective bargaining agreement in our case provided for a regular workweek of 46 hours and weekly

compensation which included payment for the overtime hours in the regular workweek at rate of time and one half the hourly rate which was determined by the following formula:

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

The hourly rates so computed were actually set forth on the payrolls and acknowledged by the employees and were actually applied when the employees worked fewer hours or more hours than the scheduled workweek of 46 hours. There was no uncertainty or irregularity in applying the hourly rate. The only question seems to be the legality of the clause of the collective bargaining agreement which gives the method of computing the hourly rate instead of stating the hourly rate.

Argument

Petitioner assigns the following reason for granting this petition:

The decision of the Court below is in conflict with the decision of the Sixth Circuit Court of Appeals in Walling v. General Industries Co. (155 F. 2d 711), of which petitioners were not advised when their petition was filed and wherein this Court granted certiorari on November 12, 1946 (Docket No. 564).

If the monthly salary plan for a regularly scheduled workweek of 51 hours, upheld by the Sixth Circuit Court of Appeals in *Walling* v. *General Industries Co.*, 155 F. 2d 711, complies with Section 7 of the Fair Labor Stand-

ards Act then, inevitably, the weekly wage plan for a regularly scheduled workweek of 46 hours, as agreed upon by the Union and the employers association in our case, and approved by the National War Labor Board, must be valid.

The reasoning of the Sixth Circuit Court in deciding that the employer had compensated its employees for overtime in accordance with the Act is simple (p. 715):

> "* * * The salary of these men was formerly paid on an hourly basis. A change to a salary basis was negotiated between the union and the employer, the salary being calculated to include an allowance of time-and-one-half for overtime. * * * The pay was figured in a shift from hourly pay to monthly salary, at 80 cents an hour, which was the amount they would have earned at the regular hourly rate prior to February 1, 1941, plus overtime at the rate of time-and-one-half the regular hourly rate of pay for hours worked in excess of 40 for a scheduled work-week of 51 hours. It is not shown that any of these men ever worked more than eleven hours overtime each for the four weeks included in the monthly salary period, and for this time their salary includes an allowance of one-and-one-half pay for overtime * * *."*

Under the monthly salary plan, upheld in the *General Industries* case, there was no increase in the compensation paid monthly, unless the employees exceeded the scheduled workweek of 51 hours. Therein lies the essen-

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* Actually, an examination of the record in *General Industries*, shows the monthly salaries paid at the commencement of the arrangements were slightly less than would have been required by reference to the former rate of $.80 per hour. Later the salaries were adjusted to a higher monthly basis without reference to any hourly rate.

tial conflict* with the Second Circuit Court's opinion in our case, where the Court said (Record, p. 84):

> "* * * It does negate the statutory purposes to base employment upon a regular unvarying weekly wage for a workweek in excess of the statutory minimum hours and then merely break that down into so-called regular and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate. *That amounts but to an illusion of overtime*

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* Disregarding the formal difference between a monthly salary, inclusive of overtime, and a weekly wage, inclusive of overtime, the essential similarity between the questions presented by the petitions in the two cases emphasizes the conflict between Circuits.

In the *General Industries* case, Docket No. 564, the Administrator states the question as follows: "The employees in this case received flat monthly salaries under contracts of employment which did not specify regular or hourly rates of pay. * * * In the negotiations concerning the amount of the salary, consideration was given, *inter alia*, to the hourly rates previously paid. The question is whether the court below was justified in holding, notwithstanding the ruling of this Court in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, that Section 7 of the Fair Labor Standards Act did not require that the employees receive compensation in addition to their salaries for hours worked in excess of the statutory maximum."

In our case, Docket No. 497, the question was stated as follows: "More broadly viewed, the question is whether under the Act employers and employees can ever effectively agree what the weekly earnings or 'take home' pay, inclusive of overtime, shall be for a regular workweek in excess of 40 hours, reducible by a clear formula to an hourly rate for the purpose of determining compensation when the hours worked are less than or more than the regular workweek; or whether the *Missel* formula ('Wage divided by hours equals regular rate', 316 U. S. 572, 580) is mandatory despite the contrary agreement and practice of the parties."

Differences in the facts, adverted to later in the text above, do not alter the fundamental conflict between Circuits. These differences—statement of the rate by formula and its translation to the weekly payrolls, plus the actual application of the formula rate where the hours exceeded or were less than the regular workweek—are points favorable to our case not present in the *General Industries* case.

pay after a forty hour workweek where there can be no increase in pay per workweek because of overtime work unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek * * *" (italics ours).

The test which the Second Circuit regards as critical is of no consequence under the Sixth Circuit's theory, if, in fact, the compensation agreed upon and paid for regularly scheduled workweeks in excess of the statutory workweek of 40 hours is sufficient to include compensation for the scheduled workweeks on the basis of time-and-one-half for overtime hours at the hourly rate paid when the salary was negotiated. The weekly salary paid under the National War Labor Board Agreement, in our case, meets this test. The agreement expressly provided that it should not be construed to lower the hourly rate presently received by any employee. It also provided that the overtime rate for hours exceeding 40 per week should be at least time-and-one-half the hourly rate. At the trial it was stipulated that the respondents "were employed and paid in accordance with the terms and conditions" of the Agreement.

Moreover, the Trial Court in our case found that the hourly rates derived from the formula were actually applied in "all situations" whether the employees worked less hours or more hours than the regularly scheduled workweek of 46 hours. Such hourly rates cannot be fictitious.

In this respect, the wage plan presented by our case conforms to general criteria recently laid down by this Court (see Point 3 of original petition), and goes beyond both the monthly salary plan presented by the *General Industries* case and the weekly salary plan presented by *Walling* v. *Halliburton Oil Well Cementing Co.* (Docket No. 74) now awaiting argument in this Court. In another

respect our case is more favorable than *General Industries* because the hourly rates, while not stated in the Agreement, were set forth in the payrolls after September 20, 1942 and acknowledged by the employees. It is difficult to believe that this Court which has so often refused to exalt form over substance would spell a difference between statement of the hourly rate in the agreement and statement of the formula for determining the rate when the calculation was actually made and translated to the payrolls.

When the petition for review was filed in this case on September 13th, petitioners' counsel were not cognizant of the Sixth Circuit Court's decision in the *General Industries* case. Their attention was directed to it shortly after the Administrator of the Wage and Hour Division filed his petition with this Court, on October 3, 1946.

At the Administrator's request, this Court has now granted review of two wage plans which necessarily involve the proper determination of the "regular rate" under Section 7 of the Act. Review of the *Halliburton* case was urged, notwithstanding the apparent governing precedent in *Walling* v. *Belo*, 316 U. S. 624, because of the different views of the Circuit Courts as to the effect of more recent decisions by this Court on the *Belo* doctrine. The *General Industries* case was urged on the ground of direct conflict with *Overnight Motor Co.* v. *Missel*, 316 U. S. 572. Our case is now presented for rehearing on the basis of a conflict between the Second and Sixth Circuits not heretofore known to exist, in addition to the grounds asserted in the original petition, which we believe to be meritorious.

Moreover, events since the denial of the petition on October 28, 1946 demonstrate that the predictions of a flood of litigation in the Federal and State Courts of New York were not unfounded. Formerly, the threat related primarily to suits attacking the validity of the so-called Meyer and National War Labor Board Agreements, which gov-

erned relations in the Building Service Industry in New York City between 1942 and 1945. Now the threat of litigation has been extended to certain classifications of employees under the so-called Frankenthaler Agreement, based upon an award by the Honorable George Frankenthaler, former State Supreme Court Justice, which governs labor relations in this field until 1948.

It would be difficult to exaggerate the necessity for a decision on the merits of the wage plan involved in the National War Labor Board and Meyer Agreements, and in part, in the Frankenthaler Agreement, as a means of avoiding constant litigation and relitigation of the same substantial question. This Court has often cautioned that its denial of a petition for certiorari is not to be construed as a decision on the merits. That being so, real estate employers who have now twice been subjected to substantial retroactive liabilities—first, because of mistake of law as to coverage—and now, apparently because of mistake as to what constitutes compliance with Section 7—will continue to resist countless double liability actions until the merits of the wage plan involved in their collective bargaining agreements have been finally adjudicated.

Conclusion

For the foregoing reasons, petitioners respectfully pray that the order of this Court denying their petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit be reheard and vacated and that the petition be granted.

Dated: November 21, 1946.

Walter Gordon Merritt,
Robert R. Bruce,
Counsel for Petitioners.

Counsel's Certificate

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

WALTER GORDON MERRITT,
ROBERT R. BRUCE,
Counsel for Petitioners.